

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRUCE HOWARD,

Plaintiff,

v.

CASE NO. 10-CV-11470

HON. GEORGE CARAM STEEH

BETH GARDON, *et al.*,

Defendants.

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION (#46) AND DENYING
PLAINTIFF'S MOTION TO STRIKE (#44)

Plaintiff Bruce Howard, a prisoner currently incarcerated at the Kinross Correctional Facility in Michigan's Upper Peninsula, filed this prisoner civil rights case on April 13, 2010. On July 30, 2010, defendants Gardon, Chadwell, Scutt, Lashley, and Caruso filed a motion for dismissal and/or summary judgment. On March 9, 2011, the court accepted and adopted the magistrate judge's report and recommendation and ruled: (1) defendants Gardon, Chadwell, and Lashley's request for summary judgment as to the exhaustion requirement is denied without prejudice; (2) defendants Gardon, Chadwell, and Lashley's request for dismissal for failure to state a claim is denied; (3) defendants Scutt and Caruso's request for dismissal for failure to state a claim is granted; (4) the claims against defendants Jones and Russell are dismissed *sua sponte*; and (5) defendants' request for an award of costs is denied without prejudice. On July 8, 2011, defendants filed their answer and affirmative defenses. On August 4, 2011, plaintiff filed a motion to strike certain of the affirmative defenses arguing

defendants waived these defenses by not asserting them in their motion to dismiss plaintiff's complaint. On August 24, 2011, the magistrate judge issued a report and recommendation to deny plaintiff's motion to strike. After receiving an extension, on September 28, 2011, plaintiff filed an objection to the magistrate judge's report and recommendation. In his objection, plaintiff again argues defendants waived their affirmative defenses by not asserting them in their motion to dismiss. The court has reviewed the report and recommendation and agrees with its analysis and conclusion. The magistrate judge fully addressed plaintiff's argument concerning waiver in her report and recommendation and discussed applicable Sixth Circuit case law. Therefore,

The court hereby ACCEPTS and ADOPTS Magistrate Judge Michelson's August 24, 2011 report and recommendation and DENIES plaintiff's motion to strike.

SO ORDERED.

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

Dated: October 5, 2011

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record on October 5, 2011, by electronic and/or ordinary mail and also to Bruce Howard #233473, Kinross Correctional Facility, 16770 S. Watertower Drive, Kincheloe, MI 49788.

S/Josephine Chaffee
Secretary/Deputy Clerk